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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

Numbers 421 and 422

(Cross-Petition Numbers 423 and 424)

THE CITY OF INDIANAPOLIS, et al.,
Petitioners,

v.

THE CHASE NATIONAL BANK OF THE
CITY OF NEW YORK, Trustee, et al.,
Respondents.

No. 421

THE CITY OF INDIANAPOLIS, et al.,
Petitioners,

v.

THE CHASE NATIONAL BANK OF THE
CITY OF NEW YORK, Trustee, et al.,
Respondents.

No. 422

**RESPONDENT THE INDIANAPOLIS GAS COMPANY'S
BRIEF IN OPPOSITION TO GRANTING WRIT
OF CERTIORARI**

✓ LOUIS B. EWBANK,
✓ WILLIAM R. HIGGINS,
Indianapolis, Indiana,
Counsel for Respondent,
Indianapolis Gas Company.

1311 Fletcher Trust Bldg.

1008 Odd Fellows Bldg.

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ABBREVIATIONS

The following abbreviations are used throughout this brief:

City of Indianapolis is referred to as "City".

City of Indianapolis and those trustees and Directors for Utilities who join in the Petition for Certiorari as "Petitioners".

Chase National Bank of the City of New York, Trustee, respondent herein, as "Chase".

Citizens Gas Company of Indianapolis as "Citizens Gas."

The Indianapolis Gas Company as "Indianapolis Gas," the three respondents herein and Chase National Bank, Citizens Gas Company and the Indianapolis Gas Company, as "Petitioners".

The Bill of Complaint is called the "Bill".

The word Paragraph is called "Par."

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Petitioners,

v.

THE CHASE NATIONAL BANK OF THE CITY OF
NEW YORK, TRUSTEE, ET AL.,
Respondents.

**BRIEF OF RESPONDENT THE INDIANAPOLIS GAS
COMPANY IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

Two appeals (Nos. 7143, 7144) from the same judgment of the District Court were heard together on the same record, and decided with a single opinion (IV R. 1281 to 1306) and the same judgment was entered in each (IV R. 1307, 1308).

Substantially the same petitions and supporting briefs have been filed by the City, et al., in each cause (No. 421, 422) and defendant appellant Indianapolis Gas is filing one brief in opposition to such petition. The said opinion of the Circuit Court of Appeals is reported in 113 Fed. (2d)

217. The cross-petitions for certiorari (Nos. 423, 424) of Chase National Bank being conditional upon what disposition is made of the City's petitions, are not separately answered.

STATEMENT OF FACTS AND MATTERS INVOLVED.

The decision of the Circuit Court of Appeals in these causes, the review of which by this court is now sought by the petitioner, is set out in IV R. 1281-1305 and reported in 113 Fed. (2d) 217.

The facts are there fully and accurately stated, and while in neither the petition nor brief of the petitioner does there appear any direct contradiction of or objection to any statement of fact or issue as therein made, we shall briefly discuss the same as they bear on the correctness of the decision challenged.

A. In 1902, Indianapolis Gas, operating in the City of Indianapolis, executed a mortgage to secure a bond issue in the authorized amount of \$7,500,000, of which \$4,000,000 were originally authenticated and issued. Chase is now sole trustee under said mortgage indenture.

B. In 1905, Citizens Gas was formed as a public utility for the purpose of supplying the City of Indianapolis with light, heat and power. The Citizens Gas was original trustee of a charitable trust in the property it acquired with the right given the City of Indianapolis to become successor trustee, subject to legal obligations.

C. In 1913, under express provisions section 95^{1/2} of the Indiana Public Utility Law (Appendix No. I, p. 16), Citizens Gas, with the approval and by order of the Public

Service Commission, leased the property of the Indianapolis Gas for a term of 99 years. Among other provisions, lessee for itself, successors and assigns undertook to pay interest on all outstanding bonds of Indianapolis Gas. At hearing by Public Service Commission on petition to approve proposed lease, City was represented by counsel and consented to order of approval. (Bill, par. 8, I. R. 9, 10; admitted I. R. 149, 150.)

Following the order of Commission and the execution of the lease, one Fishback, a resident of Indianapolis and certificate holder of Citizens Gas, brought suit in the court of Marion County, Indiana, to set aside the order of the Public Service Commission and to enjoin the lease being put into effect. Citizens Gas, Indianapolis Gas, the City and members of the Public Service Commission, were made parties defendant. Among other alleged grounds for invalidity of the lease, Fishback alleged the lease was for too long a time and that it would be so burdensome as to defeat the charter provisions by which the City might take under the plant and property of the Citizens Gas. Upon trial judgment was entered against plaintiff; appeal was taken to Supreme Court of Indiana, where it was dismissed (193 Ind. 282).

In 1921 Citizens Gas surrendered its City franchise and received from Public Service Commission an indeterminate permit pursuant to Acts 1921, Chapter 93, page 197.

Appendix No. 3, p. 17.

On March 20, 1929, City, through its Board of Public Works, declared its intention to succeed to the property and interest of Citizens Gas pursuant to franchise agreements and demanded of that company its entire property and

interests "of whatever nature or character." (I R. 671-672.) Said gas system was to be taken by the City subject to "all legal obligations against said Company," by virtue of Ordinance of the Common Council of the City (Vol. III R. 1017-1019) and pursuant to the Acts of 1905, pages 246, 247.

Appendix No. 2, p. 16.

It was provided by the ordinance "that the Public Charitable Trust in all such plant and property so delivered to and accepted by said Board of Directors for Utilities be and is hereby received and accepted and the City of Indianapolis hereby agrees to the conditions and terms accompanying such trust and acknowledges itself bound to carry them out" (III R. 1017-1019).

E. In 1930, one Williams brought a representative suit in Marion County, Indiana, naming as defendants the City, and its trustees and directors for utilities, Citizens Gas, Indianapolis Gas, and the then trustees under the mortgage deed of trust of Indianapolis Gas, being all parties to the action at bar. Williams sued as a beneficiary of the public charitable trust and for all others similarly situated, seeking judgment declaring the 99-year lease invalid.

The following grounds, among others, were alleged in the complaint: that the lease was void and a cloud on the title of the public charitable trust, and that the order of the Public Service Commission approving the lease was invalid (II R. 785).

That the lease was disadvantageous to the lessee and burdensome on the public charitable trust (II R. 795).

That the lease was "ultra vires" said Citizens Gas Company (II R. 790).

In the hearing of said cause, all defendants, including City and Citizens Gas, demurred to the complaint and urged the validity of said lease (II R. 806-807). The trial court entered final judgment in the cause against plaintiff (II R. 632-633), from which judgment Williams appealed to the Supreme Court of Indiana. Judgment was affirmed by that court in an opinion reported in *Williams v. Citizens Gas*, 206 Ind. 448.

F. In March, 1935, City by its Board of Directors for Utilities authorized the issuance of bonds in the principal aggregate amount of \$8,000,000, principal and interest to be paid from income and revenue of the gas system. The proceeds from such sale of bonds to be used to take over the property owned by Citizens Gas "and/or in which it had an interest" (II R. 822-830).

G. In seeking sale of its revenue bonds, City issued a prospectus to certain security firms as prospective bidders. The City there stated that the gas system of Citizens Gas was owned partly in fee and held partly under the 99-year lease (II 535).

Said bonds were purchased by security houses in reliance on said statements (II R. 533 to 536) who in turn offered them for sale to the public under a circular setting out similar statements of fact (I R. 194-198).

H. On September 9, 1935, after having previously notified Indianapolis Gas that it would take over the property "which has been operated by Citizens Gas," (III R. 836), the City accepted, recorded and retained instruments of conveyance and assignments of all property of Citizens Gas, including the lease in question and went into possession of all of said property, including the leased property and has continued in possession and operation of

the said property continuously thereafter (II R. 230, 350, 622-3). Subsequent to receipt of said instruments and on taking possession of said property, it adopted an ex parte resolution in which it denied the acceptance of the obligations incidental to the leasehold estate (I R. 131). By Ordinance of City's Common Council above referred to the City accepted the public trust and agreed to be bound by the conditions and terms accompanying it (III R. 1017-1919).

Until March 2, 1936, no right was granted City by any party to retain possession of the leased property other than by virtue of the assignment to it of the lease by Citizens Gas (III R. 981).

Interest on bonds of Indianapolis Gas due October 1, 1935, and April 1, 1936, was paid by the City. All interest due thereafter has been unpaid and in default.

SUIT AND JUDGMENT.

This action was brought by Chase as Trustee under the mortgage indenture against Indianapolis Gas, Citizens Gas and the City seeking a declaratory judgment that the lease was valid and to recover judgment for unpaid bond interest, with interest thereon, against all defendants and the trust property taken over by the City.

The decision now sought to be reviewed held:

1. That Chase was entitled to a declaratory judgment that the lease is valid and enforceable according to its terms and provisions against City as trustee and the trust property and all other parties defendant.

2. That judgment be entered in favor of Chase, as Trustee for bondholders, for all past due bond interest with

interest thereon at the rate of 5 per cent per annum, against the City as Successor Trustee, Citizens Gas and Indianapolis Gas, in said order of liability.

ARGUMENT.

The petitioner in the brief supporting its petition presents certain assignments of error, with argument thereon. We shall briefly discuss these in the order they are presented.

A.

THE DECISION OF THE CIRCUIT COURT OF APPEALS PROPERLY DIRECTED A JUDGMENT TO BE ENTERED AGAINST THE CITY AS SUCCESSOR TRUSTEE AND NO ISSUE OF BURDENSOMENESS OF THE LEASE REMAINED IN THE CASE FOR ANY FURTHER TRIAL. BY THE DECISION THE CITY WAS NOT DENIED ANY RIGHT OF DUE PROCESS OF LAW.

The question of burdensomeness of the lease arose solely through allegations by City in its counter-claim that it had the right as Successor Trustee "to refuse and reject an assignment of the lease on the ground that such lease was burdensome and not advantageous to the trust" (I R. 186).

This issue was entirely removed from the case, and properly so, by the decision that the lease is valid, and that the leasehold estate became, upon its creation, a part of the *res* of the public charitable trust expressly accepted by the City. By its express acceptance of the trust as Successor Trustee, "agreeing to the conditions and terms accompanying such trust" (III R. 1017-1019), and through the instruments of conveyance and assignment of the entire trust property, including that held both in fee and under the lease, and taking possession, an alleged reason for "rejecting" part of it becomes solely academic.

Indianapolis Gas in its brief to the Circuit Court of Appeals ~~urged~~ that this alleged burdensomeness of the lease was immaterial and not a proper issue in the cause, and that it required no further trial by the District Court. To this contention the City made no denial, either in brief or by oral argument.

Whether or not the lease was invalid because of being burdensome on the trust had been raised in early litigation in the courts of Indiana by beneficiaries of the trust, suing in behalf of all so situated. It was in those cases decided that no "burdensomeness" existed, such as might create a defense to or cast a cloud upon the validity of the lease.

The decisions so rendered were in accord with the contentions made both by City and Citizens Gas throughout that litigation.

Fishback v. Public Service Commission, 193 Ind. 282 (II R. 624 to 626; 648 to 668);

Williams v. Citizens Gas Company, 206 Ind. 448 (II R. 630 to 633; 761 to 812).

The issue of burdensomeness as a ground for urging invalidity of the lease was thus settled and determined in those adjudications, as to the trust itself, which bind all succeeding trustees. This issue being fairly and definitely tried and adjudicated, no constitutional right exists to a party or privy to retry that issue in subsequent litigation.

The issue of burdensomeness was, however, definitely presented to the City in the forming of its decision whether it would or would not succeed Citizens Gas as trustee of the charitable trust. It was for the City to determine in that decision whether the trust in its entirety, weighing both its assets and liabilities, was one which it desired to administer as a succeeding trustee. It decided

upon succession, and voluntarily accepted said trust in its entirety, with all of its values and likewise subject to all its liabilities.

It is respectfully submitted that the question of burden-someness was never a proper issue in this cause and even had it been, it would have ceased² to be so upon the decision of Circuit Court of Appeals that the lease was valid for its express term upon execution and approval by the Public Service Commission, and that the leasehold estate was part and parcel of the trust *res* at the time of City's succession as trustee.

All the cases cited by petitioner declare rulings universally accepted, but that they support the present petition of the City or are in anywise applicable to the present issues is conclusively disproved by the undisputed facts and the issues determined.

It is submitted that petitioner's contentions that it has been deprived of constitutional rights of due process are wholly without substance.

B.

JURISDICTION OF THE UNITED STATES COURT OVER THE CAUSE RESTS UPON DIVERSITY OF CITIZENSHIP AND THE REALIGNMENT OF INDIANAPOLIS GAS TO THE POSITION OF A PLAINTIFF WAS PROPERLY DENIED.

The District Court upon the pleadings and prior to the trial on the merits, realigned Indianapolis Gas as a party plaintiff and thereupon dismissed plaintiff's Bill for want of jurisdiction. This decree was reversed upon appeal to the Circuit Court of Appeals with opinion reported in 96 Fed. (2d) 363; II R. 285-293. City's petition for certiorari was by this court denied (305 U. S. 600).

The contention of the City made then, and now repeated, that no substantial controversy existed between Chase and Indianapolis Gas, indeed seems extraordinary in view of the decree rendered after trial on the merits by the District Court granting judgment in favor of Chase solely against Indianapolis Gas in the amount of \$1,032,150; and the decision of the Circuit Court of Appeals directing a judgment in favor of Chase against Indianapolis Gas and others in even a larger amount. It is true that by the judgment of the Court of Appeals the liability for the discharge of this judgment by Indianapolis Gas is a secondary one, but that it remains liable for its payment until its satisfaction may not be denied. Being the mortgagor its liability continues as a surety and a surety is a necessary co-defendant.

The cases cited and argument here made by petitioner were all presented to this court in support of the former petition for certiorari which this court denied (305 U. S. 600).

Suffice it to say that existence of the controversy between Chase and Indianapolis Gas, as alleged in the pleadings, was substantiated both by the judgment of the District Court after trial on the merits and by the judgment of the Circuit Court of Appeals, a review of which is now sought.

Venmer v. Great Northern R. Co., 209 U. S. 24,
31-32, 52 L. Ed. 666;

Republic Nat. Bank v. Massachusetts B. & I. Co.,
68 Fed. (2d) 445, 447;

Rex. Co. v. International Harvester Co., 107 Fed.
(2d) 767, 768.

C.

THE RULE ANNOUNCED BY THE COURT IN *ERIE RAILROAD v. TOMPKINS*, 304 U. S. 64, WAS NOT DISREGARDED OR VIOLATED BY THE DECISION OF THE CIRCUIT COURT OF APPEALS, IN THE DETERMINATION OF ANY ISSUE PRESENTED.

Both in the District Court and the Circuit Court of Appeals, this respondent contended that under the rule of *Erie Railroad v. Tompkins* all issues as to the validity of the lease and its enforceability against the City as successor trustee and the trust property should be determined by the law of Indiana. And *Williams v. Citizens Gas Company*, 206 Ind. 448, was cited as declaring the law which controls. This was accepted by the Circuit Court of Appeals and its decision is in full accord with both the statutory law of the State and the decisions of its court of last resort.

It was accepted by the courts both at the trial and on appeal and all parties litigant that no federal question was in issue, nor was any presented either in brief or in argument.

It has long been established in Indiana, as it has generally, that where an issue has been legally adjudicated that judgment is binding upon the parties and their privies in interest.

Skelton v. Sharp, 161 Ind. 383;

Fischli v. Fischli (1825), 1 Blackford (Ind.) 360;

Knott v. Clark Construction Co., 191 Ind. 365.

It is also settled in Indiana, as it is generally, that the judgment in a representative suit brought by one beneficiary of a trust in behalf of all is binding upon all.

Burns Ind. Ann. Statutes (1933), sec. 2-213; 2-220;
Gaiser v. Buck, 203 Ind. 9;
Sigel v. Archer, 212 Ind. 599.

The cases cited by petitioner wholly fail to support a contention that the judgment in this cause is other than entirely in accord with the controlling laws and decisions of Indiana. The decision itself conclusively shows that it firmly rests upon that law.

D.

THE JUDGMENT IS AGAINST THE CITY SOLELY AS TRUSTEE AND THE TRUST PROPERTY. IT IS NOT AN OBLIGATION OF THE CITY AS A MUNICIPALITY OR A CHARGE UPON ITS POWERS OF TAXATION.

The sole issue presented in this cause, so far as City is concerned, is the liability it assumed as a successor trustee of the public charitable trust. No judgment was either sought or given declaring any liability against the City as a taxing unit. The language of the opinion of the Circuit Court of Appeals is clear and definite upon this point.

No direct obligation of the City being in issue, the statutes set out in appendix in the petitioner's brief have no application to any issue presented. These statutes refer solely to the creation of direct obligations of the City, such as contracts for street lighting, police and fire protection, etc. Were it otherwise, the bonds issued by the City in the principal amount of \$8,000,000 which are solely a charge upon the revenues of the gas system, would be invalid. The City had express statutory power

"to receive gifts * * * and purchase trusts and to agree to conditions and terms accompanying the

same and bind the corporation to carry them out' (See Appendix 2, pp. 16, 17).

The section quoted and sections 85 and 254 cited by petitioner are parts of the same statute.

It is submitted no public question is here presented, no municipal rights are involved, and the sole responsibilities determined are those of a trust now voluntarily administered by the City as trustee; responsibilities all of which were expressly undertaken and assumed by the City in its succession to such trusteeship.

SUMMARY

This respondent respectfully submits that no valid reason has been presented or exists for granting the writ sought by the petitioner. No important public question is presented or federal issue involved. The decision itself rightly decides the questions presented in accord not only with the law of Indiana, but with principles universally accepted and followed.

WHEREFORE, this respondent prays that the petition for the writ here sought be denied.

Respectfully submitted,

LOUIS B. EWBANK,

WILLIAM R. HIGGINS,

Both of Indianapolis, Indiana,

Counsel for Respondent,

The Indianapolis Gas Company.

APPENDIX

APPENDIX No. 1

Section 95½, Chapter 76, Acts 1913, page 199 (since amended).

“That with the consent and approval of the commission but not otherwise, any two or more public utilities, furnishing a like service or product and doing business in the same municipality or locality within this state, or any two or more public utilities whose lines intersect or parallel each other within this state may be merged and may enter into contracts with each other that will enable such public utilities to operate their lines or plants in connection with each other; and any public utility may also, with the consent of the holders of three-fourths of the capital stock outstanding, purchase or lease the property, plant or business or any part thereof of any other such public utility at a price and on terms fixed by the commission. Any such public utility may, with the consent of three-fourths of the holders of the outstanding stock, sell or lease its property or business or any part thereof to any other such public utility at a price and on terms fixed by the commission upon paying in cash to non-consenting stockholders the appraised value of their stock as fixed by the commission.”

APPENDIX No. 2

Section 53 (in part), Chapter 129, Acts 1905, page 247; Burns' 1933, sec. 48-1407. In part:

“Sec. 53. The common council of every city shall have power to enact ordinances for the following purposes:

"First. To provide a corporate seal, with appropriate device, for such city, to be affixed to all instruments or writings needing authentication.

"Second. To fix the salaries or compensation of the various officers and employes of such city, except where a different provision is made in this act: *Provided*, that in cities of the first and second classes, no member of the common council shall be allowed more than two hundred dollars; in cities of the third and fourth classes, more than one hundred and fifty dollars; and, in cities of the fifth class, more than one hundred dollars for each year of his service. No salary or compensation, of any city officer so fixed shall be changed after his election or appointment during the term of his office.

"Third. To protect all city property.

"Fourth. To provide for the punishment of contempt and disorder in the rooms of the council.

"Fifth. To authorize a census of the city.

"Sixth. To receive gifts, donations, bequests and public trusts and to agree to conditions and terms accompanying the same and bind the corporation to carry them out. * * *

APPENDIX No. 3

Section 1, Chapter 93, Acts 1921, page 197:

"Section 1. * * * any public utility operating under an existing license, permit, or franchise, from any county, city or town, within the State of Indiana, shall upon filing at any time prior to July 1, 1923, with the auditor or clerk of any such county, city or town which granted such license, permit or franchise, and with the public service commission of Indiana, a written declaration, legally executed that it surrenders such license, permit or franchise, received by operation of law in lieu thereof an in-

determinate permit as provided in the act creating the public service commission of Indiana, entitled 'An act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission,' approved March 4, 1913, and such public utility shall hold such permit under all the terms, conditions and limitations of said act as fully and completely as if the same had been done prior to July 1, 1915."